IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL DEPOSIT INSURANCE CORPORATION, Exclusive manager of Resolution Trust Corporation, as conservator for HORIZON FINANCIAL, F.A.,	:	CIVIL ACTION
Plaintiff,	:	
LOUIS DEGLAU and MARGARET DEGLAU,	:	NO. 90-3594
Defendants.	:	

MEMORANDUM

R.F. KELLY, J. JANUARY 16, 1998

This case has been returned from the Third Circuit Court of Appeals because I did not state the reasons for the Order I signed, on August 22, 1994, denying Defendants' "Complaint in Equity and/or a Motion to Open or Strike Judgment" ("Motion to Open or Strike Judgment").

After this case was returned, I held a status conference. As a result of that conference, I entered an Order on September 30, 1997 vacating my Order of August 22, 1994 and giving Defendants until October 17, 1997 to file a brief in response to Plaintiff's memorandum. At Defendants' request, that deadline was extended to November 14, 1997 by an Order entered October 16, 1997.

FACTUAL HISTORY

Louis Deglau was the president and principal shareholder of Kelt, Inc. ("Kelt"), a Pennsylvania corporation engaged in the business of coal reclamation. Mr. Deglau is an experienced

businessman. Defendant Margaret Deglau is his wife. On or about March 27, 1985, July 25, 1986, March 20, 1987 and April 5, 1988, Kelt entered into a series of loan transactions with Horizon Financial, F.A. ("Horizon"), a federally chartered savings and loan association based in Bucks County, Pennsylvania. As part of this transaction, Mr. Deglau, on behalf of Kelt, executed and delivered to Horizon four separate Term Promissory Notes in the principal amounts of $1,150,000, $300,000, $160,000 and $25,000 (the "Notes").

To secure the obligations of Kelt and to induce Horizon to lend additional funds, the Deglaus executed an Agreement of Guaranty and Suretyship dated November 25, 1985 (the "Guaranty"). Pursuant to the Guaranty, the Deglaus agreed to become unconditional guarantors and sureties for all present and future obligations of Kelt to Horizon. The Deglaus also agreed to waive "all defenses, offsets and counterclaims which the Undersigned or Borrower may at any time have to any claim of Lender against Borrower."

Paragraph 10 of the Guaranty contains the warrant of attorney provision which states:

> 10. The undersigned or any of them hereby empowers the Prothonotary or any attorney of any court of record within the United States or elsewhere to appear for the Undersigned and with or without one or more declarations filed, confess a judgment or judgments at any time against the Undersigned or any of them in favor of Lender as of any term for the unpaid balance thereof, together with unpaid interest, costs of suit and an attorney's commission of twenty percent (20%) for collection, with release of all errors and without stay of execution, and inquisition and extension upon any levy on real estate is

> hereby waived and condemnation agreed to, and the exemption of all property from levy and sale on any execution thereon, and exemption of wages from attachment, are also hereby expressly waived, and no benefit of exemption shall be claimed under or by virtue of any exemption law now in force or which may hereafter be enacted.

At the time the Deglaus executed the Guaranty, Mr. Deglau had maintained a financial relationship with Horizon for over 30 years and was represented by counsel.

Kelt and Deglaus defaulted in payment on the Notes and Guaranty. On May 25, 1990, the Office of Thrift Supervision closed Horizon and appointed the Resolution Trust Corporation ("RTC") as receiver.

On May 23, 1990, the Deglaus filed a complaint and motion for a temporary restraining order against the FDIC in the United States District Court for the Western District of Pennsylvania (the "Western District Action"). In that action, the Deglaus sought (1) a temporary restraining order enjoining the FDIC from confessing judgment and a declaration that paragraph 10 of the Guaranty was void; (2) damages for alleged malicious prosecution, abuse of process and purported violations of the Deglaus' constitutional rights pursuant to 42 U.S.C. § 1983; and (3) an accounting.

On May 25, 1990, the FDIC confessed judgment in the amount of $2,416,986.47 against the Deglaus in this Court.

On May 31, 1990, the district court in the Western District Action conducted a hearing and on June 7, 1990, issued findings of fact and conclusions of law. The court denied the Deglaus' motion for injunctive relief. Judge Ziegler found that

the Guaranty was not a contract of adhesion and that "an experienced businessman such as Mr. Deglau should reasonably be expected to understand the clear language on the agreement and be familiar with the liability and waiver of the rights involved." The court further held that the Deglaus were not likely to succeed on the merits of their section 1983, malicious prosecution and abuse of process claims. Judge Ziegler granted the Deglaus' motion to dismiss the Western District Action voluntarily and assessed costs against the Deglaus.

On June 7, 1990, the Deglaus filed the present Motion to Open or Strike Judgment, for Stay of Execution and/or for Relief from Judgment Pursuant to Fed.R.Civ.P. 60. In this motion, the Deglaus made the same claims that they had asserted in the Western District Action. On June 19, 1990, this Court issued a Rule to Show Cause why the judgment by confession should not be opened or stricken; denied the Deglaus' request for a stay of execution; and ordered that discovery be completed by August 24, 1990. As a result of several stipulations and orders, discovery was extended to May 22, 1991. On March 12, 1991, the FDIC filed a motion to compel answers to interrogatories which was granted together with an award of sanctions against the Deglaus. The Deglaus never moved to compel discovery, request a briefing schedule, or request oral argument before this Court.

REASONS FOR ORIGINAL DISMISSAL

Rule 60(b) of the Federal Rules of Civil Procedure

governs motions to open or strike a judgment entered by confession in federal court. RTC v. Forest Grove, Inc., 33 F.3d 284, 288 (3d Cir. 1994, cert denied, 115 S.Ct. 923 (1995); Central W. Rental Co. v. Horizon Leasing, 967 F.2d 832, 836 (3d Cir. 1992). "The relief is an extraordinary remedy granted under exceptional circumstances." RTC Mortgage Trust 1994-S5 v. Quick, 1995 WL 156164, at *4 (E.D. Pa. Apr. 10, 1995)(citing In re Fine Paper Antitrust Litig., 840 F.2d 188, 194 (3d Cir. 1988)).

In Forest Grove, the Third Circuit held that federal courts should apply state law, as opposed to federal common law, to the substantive aspects of Rule 60(b) motions to open or strike judgments entered by confession. 33 F.3d at 290-91 (citing O'Melveny & Myers v. Federal Deposit Ins. Corp., 114 S.Ct. 2048 (1994)). As the court explained:

> The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred.

Id. at 290 (quoting O'Melveny, 114 S.Ct. at 2055); see also Fed.R.Civ.P. 69(a) ("The procedure...in proceedings supplementary to and in aid of a judgment...shall be in accordance with the practice and procedure of the state in which the district court is held.").

Under Pennsylvania law, the prothonotary or clerk of the court is authorized to enter judgment by confession upon the filing of a complaint which includes (i) the original or a verified copy

of the signed instrument providing for judgment by confession; (ii) an averment that the defendant has defaulted under the instrument's terms; and (iii) the confession of judgment signed by an attorney appearing for the defendant. Pa.R.Civ.P. 2951, 2952, 2955, 2956. See generally Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1262-64 (3d Cir. 1994). Immediately after entry of judgment, the court must notify the defendant. Pa.R.Civ.P. 236. Once judgment has been entered, the plaintiff may obtain a writ of execution from the court by filing a request in the form of a praecipe. Pa.R.Civ.P. 2958.1.

Pennsylvania Rule of Civil Procedure 2959 governs motions for relief from a confessed judgment.[1] "If the petition states

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[1]Rule 2959 provides in relevant part:

(a) Relief from a judgment by confession shall be sought by petition. Except as provided in subparagraph (2), all grounds for relief, whether to strike off the judgment or to open it, must be asserted in a single petition.

(b) If the petition states prima facie grounds for relief the court shall issue a rule to show cause and may grant a stay of proceedings. After being served with a copy of the petition the plaintiff shall file an answer on or before the return day of the rule. The return day of the rule shall be fixed by the court by local rule or special order.

(c) A party waives all defenses and objections which he does not include in his petition or answer...

(e) The court shall dispose of the rule on petition and answer, and on any testimony, depositions, admissions and other evidence. ...If evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment....

It is the petitioner's burden to take the discovery necessary to establish a right to the requested relief. See Pa.R.Civ.P. 206.7.

prima facie grounds for relief, the court must issue a rule to show cause, fix a return date on the rule and thereafter dispose of the matter on petition and answer and any relevant evidence that can be obtained." Jordan, 20 .3d at 1262 (citing Pa.R.Civ.P. 2959(b),(e)). Any grounds not included in the petition are waived. Id. at 1263; J.M. Korn & Son, Inc. v. Fleet-Air Corp., 300 Pa. Super. 458, 461-62, 446 A.2d 945, 947 (1982); Pa.R.Civ.P. 2959(a),(c).

On May 25, 1990, the FDIC filed its Complaint in Confession of Judgment, together with verified copies of the Notes and Guaranty, Praecipe for Entry of Judgment by Confession, Entry of Appearance to Confess Judgment, and Affidavit of Default. These documents satisfied the requirements of Pa.R.Civ.P. 2950-2956. Accordingly, the Clerk of the District Court properly entered judgment against the Deglaus on May 25, 1990.[2]

On June 7, 1990, the Deglaus filed their "Complaint in Equity and/or Motion to Open or Strike Judgment, for Stay of Execution and/or for Relief from Judgment Pursuant to F.R.C.P. 60." The Rule 60 motion incorporated by reference the complaint, proposed amended complaint, and motion for a temporary restraining order that was denied in the Western District Action. In accordance with Pa.R.Civ. P. 2959(b), this Court issued a Rule to Show Cause why the confessed judgment should not be opened, denied

[2]As noted, Forest Grove requires the application of the forum state's substantive law. 33 F.3d 291. Moreover, the Guaranty provides that it "shall be construed pursuant to the laws of the Commonwealth of Pennsylvania."

the Deglaus' request for a stay without prejudice, and ordered discovery to be completed by August 24, 1990.[3] This discovery cut-off was extended by stipulation until September 24, 1990. It was later extended on the Deglaus' motion, until May 22, 1991. This provided the Defendants with almost eleven months in which to conduct discovery.

The Deglaus served their discovery request on April 22, 1990, more than three years before this Court's denial of their motion. At no time between then and now did the Deglaus move to compel responses to their discovery request or seek the intervention of this Court.

The Deglaus did not file a brief in this matter or request oral argument on their Motion to Open or Strike Judgment for a period of over four years, between May of 1990 and August of 1994. The Deglaus failed to file a memorandum of law as they were required to do at the time of their Rule 60 motion.[4]

When the FDIC filed its response to the Rule 60 motion on February 6, 1992, together with a memorandum of law, the Rule to Show Cause became ripe for decision. See Pa.R.Civ.P. 2959(e)("The court shall dispose of the rule on petition and answer, and on any

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[3]Rule 2959(b) provides that "[t]he return day of the rule shall be fixed by the court by local rule or special order." This Court's Order to Show Cause in this case required the Deglaus to request a return date upon the expiration of the discovery date, which they failed to do. See Pa.R.Civ. P. 206.7.

[4]Former Local Rule 20, which governed motion practice at the time the Deglaus filed their Rule 60 motion, is substantially the same as current Local Rule 7.1.

testimony, depositions, admissions and other evidence"); see also Pa.R.Civ.P. 206.7(c).[5] The court stated in Allied Building Products, 1996 WL 432480, at *8 (quoting Central Penn Nat'l Bank v. Williams, 362 Pa. Super. 229, 232, 523 A.2d 1166, 1167 (1987):

> Pursuant to Rule 209 [current Rule 206.7], the petitioner must either take depositions on disputed factual issues or order cause for argument on the petition and answer, thereby conceding the existence of all facts properly pleaded in the answer.

Because the Deglaus made no effort to present evidence of meritorious defenses to this Court before the date of the FDIC's response, and failed to do so for more than two-and-a-half years thereafter, together with their failure to file a brief in support of their motion, I Denied their Rule 60 Motion to Open or Strike Judgment. For those same reasons, I now Deny the Deglaus' Rule 60 Motion to Open the Judgment.

The Deglaus have not identified any "fatal defects or irregularities" on the face of the record, and therefore their Motion to Strike is also Denied. See Manor Bildg. Corp. v. Manor Complex Ass'n, 435 Pa. Super. 246, 251, 645 A.2d 843, 845 (1994).

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[5]Rule 206.7. Procedure after Issuance of Rule to Show Cause...

> (c) If an answer is filed raising disputed issues of material fact, the petitioner may take depositions on those issues, or such other discovery as the court allows, within the time set forth in the order of the court. If the petitioner does not do so, the petition shall be decided on petition and answer and all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of this subdivision.

(Emphasis supplied.)

Although I have denied the Deglaus' Motion to Open or Strike for the above reasons, because of the length of time this matter has been pending, it is prudent that I discuss the failure of the Deglaus to raise meritorious defenses to the entry of judgment.

The Deglaus purported defenses of fraud and breach of fiduciary duty are based upon an alleged oral, undocumented agreement, set forth in the complaint attached to their motion to open or strike and on page 18 of their brief.

It is well established that under the Supreme Court's decision in D'Oench Duhme & Co. v. FDIC, 315 U.S. 447, 461 (1942) that "undocumented side agreements with a failed institution taken over by the FDIC are legally inadmissible to diminish or defeat the interests of the FDIC." See Central W. Rental Co., 967 F.2d at 840-41; Adams v. Madison Realty & Dev., Inc., 937 F.2d 845, 852 (3d Cir. 1991). This doctrine serves the important purpose of "allow[ing] federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets." Langley v. FDIC, 484 U.S. 86, 91-92 (1987).

For an agreement to be enforceable against the FDIC, it must (1) be in writing; (2) be executed by the depository institution and the person claiming an adverse interest thereunder; (3) be approved by the board of directors of the depository institution; and (4) have been an official record of the depository institution since its execution. Central W. Rental Co., 967 F.2d at 841; see 12 U.S.C. § 1823(e) (codifying the doctrine developed

in D'Oench Duhme).

I therefore find that the purported oral agreements underlying the Deglaus' defenses of fraud and breach of fiduciary duty are barred under the D'Oench Duhme case.

The Deglaus alleged in their Amended Complaint in the Western District Action, incorporated by reference in their Rule 60(b) motion, that "the Guaranty was a standard form used by HORIZON and the DEGLAUS were not then represented by counsel, but relied upon the representations of Mr. Meyer and Mr. Hammer as to the legal import of the document." (WDPA Amended Compl. ¶ 11.) The Deglaus further alleged:

> The warrant of attorney itself is invalid since it is a contract of adhesion which HORIZON induced the DEGLAUS to sign through a conflict of interest on the part of their attorneys, Meyer & Flaherty. The DEGLAUS did not understand the import of the warrant of attorney, and HORIZON, through Meyer & Flaherty, induced the DEGLAUS not to seek review of the documents by their own counsel.

WDPA Amended Compl. ¶ 112.)

It is clear that "due process rights to notice and hearing prior to a civil judgment are subject to waiver." Overmyer, 405 U.S. at 185. Whether a debtor has knowingly and voluntarily signed a cognovit provision is a question of federal law. Jordan, 20 F.3d at 1273. In Jordan, the Third Circuit set forth the controlling standard for waiver under federal law:

> [A] reasonably well informed debtor need only be aware that he has given away an important right to notice and hearing before his creditor, acting under color of law, can enlist the state's power of legal compulsion to seize the debtor's property in order to satisfy or secure its debt. We think...

> the debtor need only know that if he does not comply with the terms he has agreed to for payment of the debt, the creditor may confess judgment against him and forthwith seize his property to satisfy the debt it says is owed.

Id.

As noted above, a district court deciding a Rule 60(b) motion to open or strike a confessed judgment based on the defense of lack of waiver must determine that the debtor (1) has adequately alleged facts which constitute the defense; and (2) has produced sufficient evidence to withstand a directed verdict. Carriage Properties, Inc., 152 F.R.D. at 490; Resolution Trust Corp. v. Forest Grove, Inc., 1993 WL 349429, at *2 (E.D. Pa. Sept. 8, 1993), aff'd in part, reversed in part on other grounds, 33 F.3d 284, 288 (3d Cir. 1994), cert. denied, 115 S.Ct. 923 (1995); Strick-Lease, Inc., 103 F.R.D. at 384. Here, the Deglaus failed to satisfy either prong of the test. It is undisputed that Mr. Deglau had a long standing relationship with Horizon and had borrowed at least $l.15 million before he executed the Guaranty. The Deglaus alleged no facts in their Rule 60(b) motion to support the claim that they were "induced" into not seeking the advice of counsel. (WDPA Amended Compl. ¶ 12.)[6] See Forrest Grove, 1993 WL 349429, at *5. See also Fed.R.Civ.P. 7(b)(requiring that the grounds for motions be stated with particularity). In any event, the Deglaus have presented no affidavits, depositions or other evidence to say that

[6]Indeed, after hearing Mr. Deglau's testimony in the Western District Action, Judge Ziegler found precisely the opposite--that the Geglaus had executed the warrant of attorney knowingly and intelligently.

they were somehow induced into signing the Guaranty.

The Deglaus also allege in their Motion for Reconsideration filed with this Court that, on or about January 15, 1993, they were informed that one or more of the notes guaranteed by the Deglaus had been sold to Diversified Financial Services ("DFS"). Since this issue was raised only in Defendant's Motion for Reconsideration and not raised in their Petition to Open or Strike, it has been waived. See Pa. R.Civ.P. 2959(c).

The Defendants also contend that Defendant Margaret Deglau, by signing a Guaranty dated November 25, 1985, was a "discriminated against", contrary to the provisions of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq, and the regulations promulgated thereunder ("ECOA"). In support of this defense of discrimination, the Deglaus alleged that "the law has become more fully developed" and a cite to one case, Silverman v. Estrich Multiple Investor Fund, L.P., 51 F.3d 28 (3d Cir. 1995). The issue before the Third Circuit was whether the plaintiff had standing to assert a violation of ECOA. Section 1691(a) of EDOA prohibits creditors from discriminating against any "applicant." The earlier version of Regulation B had defined an applicant as

> "any person who requests or has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit other than a guarantor, surety, endorser, or similar party."

In a subsequent amendment, the definition was revised to include guarantors as "applicants." Silverman, 51 F.3d at 30-31.

The parties dispute in Silverman centered around the effective date of the amendment revising the definition of "applicant" to include guarantors. The Third Circuit held that the effective date of the amendment to the definition of "applicant" under ECOA was December 16, 1985. Silverman, 51 F3d at 31. It is admitted on page 2 of Defendants' Response, that the Deglaus entered into the Guaranty on November 25, 1985, approximately 21 days before the effective date of the amendment to the definition of the word "applicant". Because of this, neither Defendant was an "applicant" as that term was defined under ECOA on November 25, 1985. Therefore this does not constitute a meritory defense.

For the foregoing reasons this Court will enter an Order denying the Deglaus' Motion to Strike or Open the Judgment entered against them.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL DEPOSIT INSURANCE CORPORATION, Exclusive manager of Resolution Trust Corporation, as conservator for HORIZON FINANCIAL, F.A.,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
LOUIS DEGLAU and MARGARET DEGLAU,	:	NO. 90-3594
Defendants.	:	

O R D E R

AND NOW, this 16th day of January, 1998, it is hereby ORDERED and DECREED that the Motion of Defendants Louis Deglau and Margaret Deglau to Strike or Open the Judgment entered against them, is hereby DENIED.

BY THE COURT:

Robert F. Kelly, J.